FILED
MAY 27 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1873

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

DOUGLAS E. FRANK and MICHAEL H. FOLB,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK and LAVENTHOL, KREKSTEIN, HORWATH and HORWATH,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

O'CONNOR, CAVANAGH, ANDERSON, WESTOVER, KILLINGSWORTH & BESHEARS, P.A.

By: Larry L. Smith
3003 North Central Avenue
Suite 1800
Phoenix, Arizona 85012

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1873

DOUGLAS E. FRANK and MICHAEL H. FOLB,

Petitioners,

v.

UNITED STATES TRUST COMPANY OF NEW YORK and LAVENTHOL, KREKSTEIN, HORWATH and HORWATH

Respondents

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondent Laventhol, Krekstein, Horwarth and Horwarth opposes the petition for writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in the above

matter and entitled Laventhol, Krekstein, Horwarth & Horwarth v. Horwitch, 637 F.2d 672 (9th Cir. 1981) and urges the Court to deny the same.

QUESTION PRESENTED FOR REVIEW

Has the Opinion of the Ninth Circuit Court of Appeals created a conflict in decisions among the circuits or does its opinion improperly resolve an issue of such magnitude that it should be reviewed by this Court?

ARGUMENT

Petitioners introduce their argument by stating that the principal issue addressed in this case has not previously been heard by the Supreme Court, has not received consistent treatment in the circuit courts of appeals, and is of great significance in the field of federal

securities legislation.

It is true that the issue has not been addressed by this Court. However, it need not be, particularly when the facts of this case are examined. Petitioners have addressed the legal questions raised by them as though they existed in a vacuum. Their argument pitting contribution against settlement of securities cases fails to address those issues in the context of the specific facts of this case. Here, the complaint filed by the plaintiff alleged that at least $2,000,000.00 had been misappropriated by the defendants. The settlement between plaintiff and petitioners here was for the sum of $8,000.00 on account of costs and an agreement that the settling defendants would cooperate with the plaintiffs in their case against the remaining defendants. (Settlement agreement, ¶I(a), Appendix A, Page 5 to

Petition for Writ of Certiorari)

The Ninth Circuit Court of Appeals was clearly impressed with the insignificance of the settlement between petitioners and plaintiffs in the underlying case since it specifically recognized that if the settlement had resulted in petitioners "bearing their proper share of damages, the case might be different." 637 F.2d at 675.

Given the facts of this case, it does not require resolution by the Supreme Court of the United States.

As noted, petitioners assert that the contribution issue has not received consistent treatment among the circuit courts, but their brief totally fails to address the alleged conflict. Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 540 F.2d 27 (2d Cir. 1976) was asserted below as the case in conflict. The Ninth Circuit recognized that case and

specifically noted that the negligible amount of the settlement in this case distinguished it from the principle set forth in Herzfeld.

Petitioners argue that securities litigation requires that settlement be encouraged as opposed to contribution. Unfortunately for petitioners' position, though, the Securities Act of 1933, 15 U.S.C. §77k(f) recognizes the right of contribution and sets forth the applicable standard. If this Court were the Congress, petitioners' lobbying efforts might be worthwhile. The statute, though, is clear that contribution is to be permitted. Indeed, it has been recognized in Heizer Corporation v. Ross, 601 F.2d 330 (7th Cir. 1979) that contribution supports the policy of securities legislation. 601 F.2d at 334.

The opinion of the Ninth Circuit

which may entitle respondents to contribution from petitioners does not invalidate their settlement, but it does require petitioners to participate in a more proportionate share of the burden in any judgment entered against defendants.

Certiorari should be denied.

Respectfully submitted this 26th day of May, 1981.

O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH &
BESHEARS

By
LARRY L. SMITH
3003 North Central Avenue
Suite 1800
Phoenix, Arizona 85012
Attorneys for Respondent
Laventhol, Krekstein,
Horwath and Horwath

AFFIDAVIT OF SERVICE

LARRY L. SMITH, being first duly sworn, deposes and says:

That he has made service of the foregoing brief by causing to be mailed the original and forty copies to the

Clerk, United States Supreme Court
Washington, D.C. 20543

and has caused to be mailed/delivered three copies to each of the following:

Seymour Sacks and Allen J. Kasen
Dushoff & Sacks
111 West Monroe, Suite 1518
Phoenix, Arizona 85003

Allen L. Feinstein and
Jeffrey S. Leonard
Daughton, Feinstein & Wilson
100 West Washington, Suite 1840
Phoenix, Arizona 85003

Louis L. Stanton, Esq.
Carter, Ledyard and Milburn
Two Wall Street
New York, New York 10005

Robert E. Meshel, Esq.
D'Amato & Lynch
70 Pine Street
New York, New York 10025

Larry L. Smith

SUBSCRIBED AND SWORN to before me this 26th day of May, 1981.

Vilma M. Morris
Notary Public

My com. expires:
August 9, 1981.